DEPENDENCY OF MUTUAL PROMISES IN THE CIVIL LAW.

IN the early Roman law, as in the early English law, the promises in a bilateral agreement seem to have been regarded as independent of each other so far as performance was concerned. If the agreement was by stipulation, two stipulations were necessary, and there were formed two independent unilateral contracts. If the agreement was consensual, but could not be classed with the nominate contracts of sale, hiring, partnership, or agency, no obligation arose from it until one party had performed.[1] Such obligations, also, were therefore necessarily unilateral when they arose. So that the question is fairly presented in regard only to the nominate contracts just mentioned, which, however, came to include the great bulk of contractual dealings. The proof that in these contracts the promises were at first regarded as independent is contained in a passage from Varro's treatise, De Re Rustica, written about 36 B. C. After dealing with the delivery of herds which have been sold, the author continues, " And the buyer can obtain judgment against him in an action on the sale, if he does not deliver, although he himself has not paid the money, as in like manner the seller may against the buyer if the latter does not pay the price.[2]

The next certain historical evidence is contained in a passage from the Institutes of Gaius, which were published 161 A. D.

"Or suppose an auctioneer sues for the price of a thing he has sold by auction, and that the exception is taken that the defendant ought not to be condemned unless the thing he has purchased has been delivered to him, the exception is good; but if it was one of the conditions of sale that there should be no delivery until payment of the price, the auctioneer may have this replication: 'or if it was announced previous

[1] The law as to stipulations and innominate contracts remained fixed in the Roman law, as stated. — Windscheid, Lehrbuch des Pandektenrechts, II. § 321, note 9.

[2] Quum id factum non est, tamen grex nominium non mutavit nisi est adnumeratum. Nec non emptor pote ex empto vendito illum damnare, si non tradet, quamvis non solverit nummos, ut ille emptorem simili judicio sinon reddet pretium. — Varro, De Re Rustica, II. 2, § 6.

to the sale that the thing would not be delivered to the purchaser until he had paid the price.' "[1]

There has been some conflict of opinion as to whether this passage was based on a special law aimed against auctioneers or whether the case of an auctioneer was taken merely as an illustration of a universal principle.[2] Assuming the latter view to be correct (and subsequent quotations will show that if the principle had not become general by the time of Gaius it soon became so), the passage indicates both that there was ground for an exception if the seller sought to recover the price without delivering the subject matter of the sale, and further that by special agreement as to the respective times of performance of the parties, such an exception could be met. Presumably in case of an action by the buyer, the seller would have been given relief on like principles.

There are several passages in the Digest and Code, throwing light on the topic. The jurists to whom the passages are attributed all flourished about 200 A. D., so that by that time the general theory at least of the mutual dependency of the obligations arising from one of the nominate consensual bilateral contracts must have been recognized. The most important passages are as follows:

"If, of the farms which you have bought, any have been mortgaged and have not been delivered, you shall have an action *ex emto* in order that they may be released from the creditor. Likewise, if the buyer sues for the price in an action *ex vendito* you will set up the exception of fraud."[3]

"If one who has bought a harvest of growing grapes is forbidden by the seller to gather them he can make use of this exception against the seller, if the latter sues for the price: 'if this money for which the suit is brought was promised for the harvest which has arrived at maturity and has not been delivered. . . .' "[4]

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[1] Item si argentarius pretium rei quae in auctionem venierit persequatur, obicitur ei exceptio ut ita demum emptor damnetur si ei res quam emerit tradita est; et est justa exceptio: sed si in auctione praedictum est ne ante emptori traderetur quam si praetium solverit, replicatione tali argentarius adjuvatur: 'Aut si praedictum est ne aliter emptori res traderetur quam si praetium emptor solverit.' — Gaius, IV. 126 a.

[2] Dernburg, Pandekten, II. § 20, supports the former view; Bechmann, Der Kauf I. 570, the latter.

[3] C. 8. 44. 5. Ex praediis, quae mercata es, si aliqua a venditore obligata et necdum tradita sunt, ex emto actione consequeris, ut ea a creditore liberentur. Idem etiam fiet, si adversus venditorem, ex vendito actione praetium petentem, doli exceptionem opposueris. — Antoninus.

[4] D. 19. 1. 25. Qui pendentem vindemiam emit si uvam legere prohibeatur a venditore, adversus eum petentem pretium exceptione uti poterit 'si ea pecunia, qua de agitur, non pro ea re petitur, quae venit neque tradita est. . . .' — Julianus.

". . . One may likewise defeat a suit for the price brought by one who has sold goods belonging to another by setting up the exception of goods not delivered, although he who assumed to sell them has already paid the price to the owner. He has in this case recourse against the owner. It is the same, according to Pedius, in the case of one who has sold goods while assuming to act in our affairs." [1]

" When the buyer brings an action against the seller, the price ought to be offered by the buyer, and although he offers a part of the price, not yet does he have an action against the seller; for the seller can retain the thing which he sold, as if it were a pledge." [2]

A few other passages [3] are referred to in this connection, but their bearing on the subject seems somewhat remote; and it must be admitted that the materials are too meagre to make it profitable to discuss in much detail the theories of Roman jurists on the reciprocal rights and duties in the performance of bilateral contracts of sale, hiring, partnership and agency.[4] It seems evident enough, however, that non-performance by the plaintiff of his promise in such a bilateral contract afforded generally a defence. The particular cases stated relate to sales exclusively, but the assumption made by the writers, that the principle was a general one and that sales furnished the readiest illustration, seems fair. It is a probable supposition too, that the defendant's defence was taken by exception, rather than by denial of any allegations expressed or implied in the plaintiff's pleading. That is, the plaintiff's performance was not strictly a condition precedent to his right of action, but his obligation to perform was the basis of a counter-right on the part of the defendant, and if this obligation was not fulfilled, it effected

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[1] D. 44. 4. 5. § 4. The passage in full is: Si servus veniit ab eo, cui hoc dominus permisit, et redhibitus sit domino: agenti venditori de pretio exceptio opponitur redhibitionis, licet jam is qui vendidit dominum pretium solverit (etiam mercis non traditae exceptione summovetur et qui pecuniam domino jam solvit) et ideo is qui vendidit agit adversus dominum. Eandem causam esse Pedius ait eius, qui negotium nostrum gerens vendidit. — Paulus.

[2] D. 19. 1. 13. § 8. Offerri pretium ab emptore debet cum ex empto agitur, et ideo etsi pretii partem offerrat, nondum est ex empto actio: venditor enim quasi pignus retinere potest eam rem quam vendidit. — Ulpianus.

[3] D. 18. 1. 34. § 3; D. 18. 4. 22; D. 18. 5. 7. § 1; D. 21. 1. 57; D. 21. 1. 59; C. 2. 3. 21.

[4] This has, of course been attempted by the German writers, but the results seem hardly adequate to the learning expended upon the problem. The best brief commentary on the passages quoted and others is contained in André, Die Einrede desnicht erfüllten Vertrages (Leipzig, 1890,) p. 30 *et seq.*

the destruction of the plaintiff's claim.[1] Whether there was a special exception recognized as *exceptio mercis non traditæ*,—the words used in the extract quoted above from Paulus — or whether it was regarded as a kind of *exceptio doli*, as might be inferred from the passage quoted from the Code, is not so clear; though both assumptions are often made.[2]

Besides the negative difficulty due to the slightness of the materials which the Corpus Juris affords, there is a positive difficulty in working out a complete theory. In a contract of sale the buyer was bound by the Roman law to pay the price though the subject matter of the sale were destroyed by accident before the transfer of title.[3] From this rule it might be supposed that the theory of the Roman jurists was that in order to make out an excuse for non-performance by one party to a bilateral contract, not merely failure but unexcused failure to perform by the other side was essential — that it was the wrongful breach of contract, not the mere non-receipt of what was promised, that afforded ground for an *exceptio*.[4] But this supposition does not square with the rule in regard to risk in contracts of leasing and hiring, whether of property or of personal services. In these cases non-performance, though excused by impossibility, was a defence to an action for the stipulated price.[5] There is here an inconsistency from which no amount of juridical learning has been able to effect an escape.[6]

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[1] This proposition, though now generally admitted, was formerly much doubted in Germany and stress was laid on the words in the last passage cited from the Digest, "nondum est ex empto acto" as showing that performance by the plaintiff wns a condition precedent to his right of action. But it was shown by Heerwart, Archiv für die Civil. Praxis, vii. 344, 345, that analogous expressions are used in many other places in the Digest where an exception was unquestionably necessary to protect the defendant. See also Dernburg, Pandekten, ii. § 20. note 4.

[2] The exception is classed by modern writers as a kind of *exceptio doli*, though frequently with recognition that the classification is not wholly fortunate. André, 122 Larombière, Théorie des Obligations (ed. 1885), III. 266; Giorgi, Teoria delle Obbligazioni (4th ed.), IV. 207. See also an article on the *exceptio doli*, by Römer in Zeitschrift für Handelsrecht, XX. 48.

[3] Inst. of Justinian, lib. III. tit. XXIII. 3. The subject of risk of loss after a contract of sale in the Roman Law is discussed in 9 HARVARD LAW REVIEW, 72.

[4] And so the rule is often stated, *e. g.* by Pothier, Contrat de Vente, § 307; Dernburg, Pandekten, ii. § 20. The other view is well stated by André, 146 *et seq.*

[5] Dig. 19. 1, 50, Hunter, Roman Law (3d ed.), 508, 512.

[6] See Hofmann, Periculum beim Kaufe (Vienna, 1870) pp. 18–21. The rule in regard to risk of loss after a contract of sale is of great antiquity (see Hofmann, pp. 169-188), and perhaps the most satisfactory way of dealing with that rule is to regard it as a sur-

Connected with the right to refuse performance of a contract because the other party has not performed, is the right to have the contract rescinded or dissolved for that reason and any performance already given restored if the nature of the case allow. If no performance by either party has been made, and performance by the party in default no longer can be made, either because the proper time has elapsed or for any other reason, it makes little practical difference whether it is said that the other party has the right to rescind the contract or merely that he need not perform until he receives performance. The result is the same. But where performance has been partly rendered, or is still possible, the difference is important. The right to rescind the transaction does, it is true, imply the right to refuse to perform without receiving counter performance, but the converse statement does not hold good.

Roman law did not authorize dissolution of a sale because of non-payment of the price, and the same principle is applicable to the other consensual contracts under discussion.[1] If the seller trusted to the credit of the buyer he had no other remedy than a personal action for the price.[2] In order to give the seller the right of rescission if the buyer failed to fulfil his obligations it was necessary to insert a special clause which was called *lex commissoria*.[3] In later Roman law the buyer was allowed to rescind a sale without this special agreement in case the article sold had latent defects, but not simply because the seller had broken his contract.[4]

Modern civil law has developed and in some respects changed the doctrines of the Roman law.

In France it is well recognized that one party to a bilateral contract has the right to refuse performance until the other party has performed or offered to do so. This is called the right of retention, being considered analogous to the right of a pledgee.[5] The Code Civil expressly gives the right only in the case of sales and

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vival in a particular class of cases of the early doctrine of the independence of mutual promises, indicated by the quotation from Varro, *supra*, in spite of the later development of a general doctrine of inconsistent nature.

[1] Windscheid, Lehrbuch, II. § 321, note 9.

[2] Actio, tibi pretii, non eorum quae dedisti repetitio competit. C. 4. 38. 8. See also C. 4. 44. 14.

[3] Larombière, III. 84; Moyle, Sale in Civil Law, 169; Hunter, Roman Law, 591.

[4] Larombière, III. 85; Moyle, Sale in Civil Law, 201; Hunter, Roman Law, 498–502.

[5] Saleilles, Annales de Droit Commercial, VII. 25; Larombière, III. 266.

in favor of the seller only,[1] but it is not questioned that it exists in all bilateral contracts.[2]

This right, however, has been very little considered in French law, and has never received elaborate treatment by French writers. The reason for this is not far to seek. The right of one party to a bargain to rescind it for non-performance or imperfect performance by the other party, — a right which as previously stated, did not generally exist in the Roman law, — had already by legal usage been greatly extended at the time when Pothier wrote,[3] and Article 1184 of the Code Napoléon made the principle universal. That article made it an implied condition subsequent in every bilateral contract that each party satisfy his obligation to the other. The provision is unchanged in the Code Civil at the present day.[4] It is true the right of retention gives a technically different remedy and one which might possibly be more desirable in a particular case.[5] But practically the remedy of specific performance or that of rescission with damages seems to have been found sufficient. As a general rule these remedies afford more effective redress for the injured party

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[1] Art. 1612. Le vendeur n'est pas tenu de délivrer la chose, si l'acheteur n'en paie pas le prix, et que le vendeur ne lui ait pas accordé un délai pour le payement. See also Arts. 1651, 1653, 1749, 2102–2104.

[2] Larombière, III. 266; Saleilles, Ann. de Droit Comm. VII. 25. Indeed the language and illustrations of Larombière indicate that it exists in all reciprocal obligations, whether arising from contract or not.

[3] Contract de Vente § 475. This was published in 1762.

[4] Art. 1184. La condition résolutoire est toujours sous-entendue dans les contrats synallagmatiques, pour le cas où l'une des deux parties ne satisfera point à son engagement.

Dans ce cas, le contrat n'est point résolu de plein droit. La partie envers laquelle l'engagement n'a point été exécuté, a la choix ou deforcer l'autre à l'exécution de la convention lorsqu'elle est possible, ou d'en demander la résolution avec dommages et intérêts.

La résolution doit être demandée en justice, et il peut être accordé au défendeur un délai selon les circonstances.

In this connection too should be noted:

Art. 1610. Si le vendeur manque à faire la délivrance dans le temps convenu entre les parties, l'acquéreur pourra, à son choix, demander la résolution de la vente, ou sa mise en possession, si le retard ne vient que du fait du vendeur.

Art. 1654. Si l'acheteur ne paie pas le prix, le vendeur peut demander la résolution de la vente.

And there are analogous provisions in regard to exchanges in Arts. 1704, 1705.

[5] For instance, if one party after partly performing makes default, the most profitable course open to the other party may be simply to do nothing. Dissolution under Art. 1184 involves return of whatever has been received. The negative right of retention does not.

than those of the Roman or of the English law. He may have the contract dissolved with the result that he no longer is bound to perform, or, if he has already performed, that he gets back what he has given, in either case with damages, or he may have the other party compelled to perform, if that is possible.[1] The right to have the contract dissolved, like the right of retention, applies to all bilateral contracts, though not absolutely without exception.[2]

The provisions of the French law have some peculiarities of detail. In the first place, the dissolution is not effected by the mere non-performance of one party. An application to the court is necessary.[3] This may be made by a defendant as a means of defending himself from a suit;[4] but the express provision of the statute is for a direct application by the party claiming dissolution. He would therefore normally be a plaintiff rather than a defendant. Nor is the mere non-performance of the defendant sufficient foundation for a suit for dissolution. The party claiming dissolution must first put him in default by legal summons to perform or by

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[1] In France, as well as in Germany, the right to specific performance of obligations is only limited by actual impossibilities. There are not technical difficulties in addition, as in English law. 9 HARVARD LAW REVIEW, 78, n. 2.

[2] In sales of movable property, if the buyer becomes bankrupt after acquiring possession of and before paying for the goods, the seller cannot have the sale dissolved and thereby regain the goods. Cour de Cassation, 13, Mar. 1888, Journal du Palais, 1890, 1, 393. This doctrine applies to incorporeal movables. Cass. 3 Mar. 1890, Jl. du Pal. 1891, 1, 140. But in general, bankruptcy leaves unchanged the rights given by Art. 1184; one who has made a lease or exchange of property or a sale of immovable property may have the transaction dissolved for non-performance by the other party due to bankruptcy, even after transfer of possession and title. See note to case last cited. In case of bankruptcy before delivery of the goods, the syndic may take them on paying the contract price. If he refuses to do this, the seller may have the contract dissolved. Whether he is also entitled to a claim for damages, provable against the bankrupt's estate, has been somewhat disputed. In Belgium this right is allowed. Cass. Belgique, 7 Feb. 1889; Jl. du Pal. 1890, 2, 1, and a similar decision is Paris, 4 Mar. 1886, Jl. du Pal. 1887, 1, 194. But the rule in the French Cour de Cassation is otherwise, Cass. 16 Feb. 1887, Jl. du Pal. 1887, 1, 353 (reversing the decision of the Cour de Paris just cited); Cass. 8 Apr. 1895, Jl. du Pal. 1895, 1, 268. This general question is elaborately considered, including references to the legislation of other countries in Des Droits du Vendeur à livrer dans la Faillite de l'Acheteur, by C. Appleton (Paris, 1887).

There are some minor exceptions also to the general rule of Art. 1184, Larombière, III. 108; Code Civ. Art. 1978.

[3] Thus a master cannot dismiss summarily a servant or employee whose conduct is unsatisfactory before the expiration of the time fixed by the contract of employment. The master must apply to the court to have the contract dissolved. Cour de Paris, 1 Feb. 1873, Jl. du Pal., 1873, 444.

[4] Saleilles, Annales de Droit Comm. VII. 25.

some equivolent act.[1] The very nature of some contracts, however, is such that mere non-performance necessarily involves default. If performance to be effectual must be before a certain day or fixed time, for instance if the contract was for furnishing provisions to a ship which was to sail on a fixed day, the mere lapse of time without performance puts the debtor in default.[2] The same result follows if performance is promised at the creditor's domicile or some specified place other than the debtor's domicile, and at the time when the debtor should perform he is not at the agreed place prepared to do so.[3] Again, if the debtor by his words or conduct has given the creditor cause to believe performance would not be made, this will serve instead of a formal putting in default. The debtor cannot take the objection that his adversary has not done what his own conduct had authorized him not to do.[4] Finally, it may be expressly stipulated in the contract that in case of non-performance there shall be dissolution *de plein droit*.[5] The effect of this provi-

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[1] Art. 1139. Le débiteur est constitué en demeure, soit par une sommation ou par autre acte équivalent, soit par l'effet de la convention, lorsqu'elle porte que, sans qu'il soit besoin d'acte et par la seule échéance du terme, le débiteur sera en demeure.

In commercial matters a letter or telegram has been held to serve to put a party in default. Rouen, 23 Dec. 1880, Jl. du Pal. 1882, 1095; Paris, 6 Nov. 1874, Jl. du Pal. 1877, 1026, and note; but the contrary was held in Paris, 1 Dec. 1874, Jl. du Pal. 1877, 1026. See also Caen, 13 March, 1876, Jl. du Pal. 1877, 1027. It must be subsequent to the expiration of the time fixed by the contract for performance, and must be a demand for performance and not look primarily to a dissolution of the contract. Rouen, 23 Dec. 1880, Jl. du Pal. 1882, 1095.

[2] Larombière, III. 149. Similarly where the performance of a contract necessarily requires time, as to cut standing timber, failure to begin the work until it has become impossible to complete it in a reasonable time makes formal putting in default unnecessary. Cass. 17 Feb. 1869, Jl. du Pal. 1869, 386. See also Rennes, 10 Dec. 1875, Jl. du Pal. 1876, 1014. But if the contract merely specifies that wheat is to be delivered in a certain month, the seller must be put in default formally before the buyer can have the sale dissolved. Rouen, 23 Dec. 1880, Jl. du Pal. 1882, 1095.

[3] Larombière, III. 150.

[4] Ibid. 152.

[5] This clause is legal, but it must be expressly stated. If the contract provides merely that there shall be dissolution for non-performance this is taken to be but an expression of what the law implies. Larombière, III. 152. In regard to immovable property, further, by Art. 1656 of the Code Civil, even though it is stipulated in the contract that there shall be dissolution *de plin droit* it is still necessary to put the delinquent formally in default, unless it is also stipulated that dissolution shall be "sans sommation ou mise en demure." In contracts relating to movable property the better view is that these last words are unnecessary: Cass. 29 Nov. 1886, Jl. du Pal. 1887, 1, 137 and note.

The contracting parties may also agree that the contract shall not be dissolved for non-performance, or only for non-performance of a certain kind. Larombière, III. 113.

sion is more than to make it unnecessary to put the debtor in default, though that effect it has. It deprives the court of any discretion in decreeing dissolution or granting the defendant delay. The only question the court can consider is whether the contract has been broken.[1]

Except in the case of contracts which are expressly made subject to dissolution *de plein droit*, the plaintiff has no absolute right to have the contract dissolved. If the failure to perform is merely delay, and the contract still admits of substantial performance,[2] the defendant, if he sees fit, may perform, pending the action, at any time before judgment of dissolution is pronounced. Indeed, by taking an appeal, he may perform after that time, that is until judgment on appeal.[3] By the express provision too of the article of the code under consideration (1184), the court may grant such delay as it sees fit within which the defendant may perform.[4] This may be done by delaying to give judgment, or judgment may be given with a proviso that it shall not take effect for a certain time, or subject to the condition that the defendant fails to perform within

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[1] Larombière, III. 155; Aubry-Rau, Cours de Droit Civil Français (4th ed.), IV. § 302, b; Cass. 2 July, 1860, Jl. du Pal. 1860, 1101. But it does not make application to the court unnecessary to secure dissolution, Aubry-Rau, IV. § 302, b; Larombière, III. 149, though this view was maintained by the older writers. See authorities cited above.

Besides the case where it is part of the contract that the dissolution shall take place *de plein droit*, in sales of chattel property the seller has, by a particular provision of the Code (Art. 1657), an absolute right to have the contract dissolved without delay. This provision is only in favor of the seller. A buyer has not a corresponding right in case of the seller's default. In such sales, if goods ought to be taken by the buyer in instalments, failure to take one instalment gives rise to a right to have the whole contract dissolved, as it is held to be indivisible for this purpose. Larombière, III. 147, 148.

[2] In Cass. 13 Feb. 1872, Jl. du Pal. 1872, 133, there was involved a contract for the manufacture of cloth. The manufacturer was prevented by war from furnishing the goods at the stipulated time. The buyer sued for dissolution of the contract with damages while the manufacturer claimed to be wholly released from the contract by impossibility. It was held that the parties not having made it appear that the time was essential, it could be performed after the interruption caused by the war had ceased, and specific performance was ordered.

[3] Larombière, III. 144; Demolombe, Traité des Contrats, II. § 515 *et seq.* In Holland, however, it is held that by putting a delinquent party to a contract formally in default, the other party acquires a right to have the contract dissolved, which cannot be destroyed by subsequent performance. See a decision of the High Court of the Netherlands, 14 Dec. 1893, Jl. du Pal. 1894, 4, 29.

[4] There is a special provision to the same effect in regard to sales of immovable property, contained in Art. 1655 of the Code Civil.

a certain time.[1] But one delay is allowable, however. The court cannot extend the period originally granted.[2]

The nature of some contracts is such that, though there is no express provision for the case in the Code Civil, delayed performance or offer of it need not be accepted and will not always avert the dissolution of the contract. If the contract relates to a mercantile matter,[3] especially if it is for the purchase and sale of commodities which fluctuate in price from day to day,[4] or if for any reason the exact time specified in the contract is of importance, a stricter rule prevails. In such cases the normal and proper course to be taken by a party to a contract who wishes to avoid it because of the failure of his co-contractor to perform at the time specified in the contract, is immediately to make formal demand for performance, and, not receiving it, to give notice that if performance is not rendered within a stated short time, the dissolution of the contract will be claimed. The time thus fixed is not necessarily conclusive; the court may grant such delay as seems to it proper under the circumstances,[5] and although no time is fixed in the formal demand for performance, subsequent offers to perform not made within a time reasonable under all the circumstances of the case may be refused and dissolution of the contract insisted upon.[6] Nevertheless it is well to specify in the demand the extreme period of time within which performance will be accepted.[7] In contracts for the delivery of merchandise twenty-four hours is fixed by custom as a reasonable time.[8]

Analogous to the case of performance delayed beyond the stipulated time is the case of an offer of performance, imperfect or incomplete, from other causes than delay. It is laid down that where the agreement consists of a positive engagement to do or give a particular thing, the performance being single and indivisible, the agreement may be dissolved if the engagement is not

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[1] Larombière, III. 145, 146.

[2] Ibid.

[3] Paris, 12 Aug. 1870, Jl. du Pal. 1872, 756.

[4] Paris, 30 Jan. 1873, summarized in Sirey & Gilbert's annotated Code Civil, ¶ 33 of note to Arts. 1609–1611.

[5] Bordeaux, 8 Aug. 1829, summarized in ¶ 17 of the note above referred to; Cass. 15 Apr. 1845, Jl. du Pal. 1845, 1, 591.

[6] Paris, 12 Aug. 1870, Jl. du Pal. 1872, 756.

[7] See Cass. 13 June, 1876, Jl. du Pal. 1877, 413.

[8] Paris, 12 Aug. 1870, Jl. du Pal. 1872, 756.

exactly fulfilled.[1] But a slight deficiency or excess in the amount of a quantity of goods forming the subject matter of a contract is held not to warrant its dissolution.[2]

If the defendant fails to perform seasonably or within any period of delay granted by the court, the contract must ordinarily be dissolved.[3] Though the defendant's non-performance was due to supervening impossibility, which would excuse him from liability in damages, the plaintiff is none the less entitled to such dissolution.[4] If, however, by accidental mischance it had become impossible for the performance to be made at the stipulated time merely, the cause of the delay would be taken into consideration by the court and greater leniency in granting delay would be shown than if the delay were wilful. But in such a case if by special agreement or the nature of the case performance must necessarily take place, if at all, at the time originally fixed, delay, though caused by accident, is fatal.[5]

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[1] Larombière, III. 96; Aubry-Rau, IV. 83, § 302. Compare Demolombe, II. §§ 498, 499. In Cass. 12 Apr. 1843, Jl. du Pal. 1843, 2, 8, the plaintiff was held entitled to the dissolution of a contract to buy a steam engine because the defendant delivered it without a smoke-stack. It was held immaterial that the deficiency could be easily supplied and that therefore damages would be a sufficient indemnity. In Cass. 4 Dec. 1871, Jl. du Pal. 1871, 589, it was held of no avail that the seller after having made an offer of defective goods, subsequently put them in satisfactory condition and offered them again. In a later stage of the same case, Aix, 8 Aug. 1872, Jl. du Pal. 1873, 1088, the court refused to give effect to a custom by which goods if above a minimum quality, though below that stipulated for in the contract, must be accepted by the buyer, with a money indemnity for the deficiency in quality. If goods are to be made according to sample, non-conformity to the sample affords ground for dissolving the bargain. Rouen, 22 July, 1872, Jl. du Pal. 1873, 1086; Cass. 20 Jan. 1873, Jl. du Pal. 1873, 1161; Rouen, 26 July, 1878, Jl. du Pal. 1878, 1127.

The principle seems to have limits, however. In Cass. 4 Mar. 1872, Jl. du Pal. 1872, 1140, there was involved a contract for sub-letting an apartment and shop, and for the sale of certain articles of furniture in the shop. One of these articles was not delivered. It was held that the agreement for the sale of the furniture was merely an accessory stipulation, and failure to deliver one article did not afford ground for dissolution of the bargain.

[2] Cass. 12 Feb. 1887, Jl. du Pal. 1877, 782. See also ¶ 37 of the notes to Arts. 1612. 1613 in the annotated Code Civil of Sirey and Gilbert.

[3] If the contract is divisible in its nature the court may in its discretion dissolve it as a part only. Cass. 26 Apr. 1870, Jl. du Pal. 1870, 663.

[4] Larombière, III. 92; Aubry-Rau, IV. § 302, 83, and note 82; Demolombe, II, § 497; Cass. 30 Apr. 1878, Jl. du Pal. 1879, 493; Cass. 14 April, 1891, Jl. du Pal. 1894, 1, 391. In the case last cited the defendant, the lessee of a vineyard, was prevented from carrying out the stipulations of the lease by an invasion of phylloxera. The lessor was held entitled to have the lease dissolved.

[5] Larombière, III. 93.

Even though the plaintiff himself was guilty of the first breach of the contract, and this breach was the reason that the defendant subsequently committed a breach the plaintiff may have the contract dissolved. The defendant may in such a case, it is said, suspend the execution of his agreement until the plaintiff performs, but he may not be guilty of a positive infraction of the agreement if he does not want it dissolved. If he is guilty of such a positive infraction, the plaintiff may have the contract dissolved though he is liable in damages for his own prior breach of contract.[1]

There is nothing in the words of article 1184 to indicate that part performance of a contract by the party ultimately guilty of a breach affects the right of the other party to have the contract dissolved. But the obvious harshness of applying the rule universally has led to exceptions, the extent of which has not been and perhaps from the nature of the case cannot be very exactly defined, though some definition has been attempted. On the one hand it has been said that non-performance of a stipulation which is purely accessory and independent of the principal contract cannot afford ground for dissolution, such non-performance being sufficiently made good by damages.[2] Also if the infraction is of a purely negative stipulation the judge will weigh the gravity of the breach, and if not of serious importance will allow the injured party damages only.[3] And in any case a breach of trifling importance will not justify a claim for dissolution.[4] Further, if the performance has not become impossible, either because time was of the essence of the contract or for other reason, the court by

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[1] Larombière, III. 102; Cas. 8 Jan. 1850, Jl. du Pal. 1850, 2, 100. In this case the plaintiff, the owner of mining rights, had entered into a contract with the defendant, by which the defendant was given the right to carry on mining operations but agreed among other things not to do so before being authorized by the prefect — this authorization being essential by law. The plaintiff, among other things, agreed to take the steps necessary to secure the authorization. He subsequently refused to do so, and the defendant thereupon began to mine. It was held that the plaintiff was entitled to have the contract dissolved, but without prejudice to the defendant's claim for damages.

[2] Cass. 29 Nov. 1865, Jl. du Pal. 1866, 32; Amiens, 3 Aug. 1881, Jl. du Pal. 1882, 1, 695. Demolombe, II. § 498–500, is of opinion that even in such a case the court may grant dissolution, but that it has discretion to refuse.

[3] Cass. 26 May, 1868, Jl. du Pal. 1868, 890. In this case the defendant had sold the plaintiff his stock-in-trade and business, agreeing not to compete. He was subsequently guilty of some acts of competition which caused little damage. The court held that the plaintiff could not have the bargain dissolved. See also the case stated in note 2, p. 92.

[4] Larombière, III. 95. Cass. 29 Nov. 1865, Jl. du Pal. 1866, 32; Cass. 10 June, 1856, Jl. du Pal. 1857, 867.

granting the defendant a delay may avoid a dissolution of the contract.[1] Perhaps the most difficult case is where the infraction in question is a serious one and of an essential part of the agreement, but where so much that cannot be undone has been done under the contract, that serious injustice would arise if the contract were dissolved. It seems probable that the court would deal with such a case as equity required, without allowing itself to be hampered by general rules.[2]

Non-performance of one contract may even afford ground for dissolution of another, but only in case the two agreements are related to each other, as, if the making of one was the consideration of the other.[3]

The injured party may waive or renounce his right to a dissolution of the contract either expressly or by conduct irreconcilable with the idea of an intention to exercise or reserve the right. The fact that a plaintiff has previously brought action for the enforcement of a contract and obtained a decree that it be specifically carried out does not, however, operate as a waiver of the right to bring a subsequent action for dissolution.[4] Nor does merely receiving performance without objection necessarily imply a recognition of the validity of the performance and hence operate as a bar.[5]

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[1] Larombière, III. 96. Mere delay in the absence of special circumstances, it is said, cannot in the nature of things be better repaired than by performance, even though it be tardy, if nothing in the agreement forbids.

[2] Paris, 21 Apr. 1896, Jl. du Pal. 1897, 2, 9. In this case the Théâtre Français sought an injunction and conditionally the dissolution of its contract with Coquelin the elder. By this contract the actor had bound himself, among other things, to act nowhere except at the Théâtre Français. The latter agreed among other things to pay the actor a retiring pension after a specified period. The contract was carried out on both sides for more than twenty years, and Coquelin had become entitled to his retiring pension, when he asserted the right to act elsewhere. The court granted an injunction and damages for every breach of the agreement, but refused to dissolve it. See further Cass. 14 Apr. 1891, Jl. du Pal. 1894, 1, 391; Cass. 11 Apr. 1888, Jl. du Pal. 1888, 1, 520; Cass. 29 Nov. 1865, Jl. du Pal. 1866, 32.

[3] Larombière, III. 101.

[4] Cass. 27 Mar. 1893, Jl. du Pal. 1896, 1, 443; Larombière, III. 209. This was otherwise in the Roman law. The seller in demanding the price was held to have waived the right of rescission bargained for by a commissory pact, and conversely if he demanded rescission he waived his right to demand the price: Si venditor pretium petat legi commissairae renunciatum videtur, nec variare et ad hanc redire potest, D, 18. 3. 7.; Papinianus . . . scribit . . . nec posse si commissoriam elegit postea variare. D. 18. 3. 4. § 2.

[5] Paris, 18 Mar. 1870, Jl. du Pal. 1870, 1179. Saleilles, Ann. de Droit Comm. VII. 42. In contracts of sale the seller is liable for latent defects, Code Civ., Art. 1641, even

Although the literal construction of Art. 1184 might seem to lead to a different conclusion, a party seeking a remedy for breach of contract by the other party is entitled to appropriate damages as well in the case where he seeks or is awarded judgment that the contract be specifically enforced as in the case where he asks that the contract be dissolved.[1]

Analogous to the case where a party to a contract has failed to perform his obligations, is the case where before the time fixed for such performance, it becomes certain or probable from a party's words, actions, or circumstances that he will not perform when the time arrives. The French code contains no general provision for this sort of case. There are, however, special provisions which cover part of the ground. Supervening insolvency or a diminution by a debtor of any security given to the creditor by him deprive him of any term of credit given by the contract. The creditor can demand concurrent performance, unless the debtor will give him security.[2] Again in the case of sales not only a buyer who is vexed by an action in regard to the subject matter of the sale, but one who has reason to fear being vexed in the future by such an action may suspend payment of the price until the seller puts a stop to the cause of the trouble or gives security.[3] In a case of threatened non-performance not within these special provisions it seems probable that the court would grant an appropriate delay, and if the threat then had become a reality decree a dissolution, otherwise not.[4]

Judgment for dissolution when given takes effect by relation

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though not aware of them himself, Art. 1643; but not for defects which the buyer might discover by examination, Art. 1642.

[1] Larombière, III. 140. The Italian Codice Civile, Art. 1165, which is otherwise a literal translation of Art. 1184 of the French Code Civil, avoids the ambiguity of the latter by adding the words " in ambedue i casi " after the provision for damages.

[2] Code Civil, Arts. 1188, 1613; Cass. 9 Jan. 1854, Jl. du Pal. 1856, 2, 552; Paris, 22 Jan. 1856, Jl. du Pal. 1856, 1, 217. This provision is not confined to cases of actual bankruptcy. If a buyer's solvency is so precarious as to make payment by him doubtful it is enough. Paris, 11 July, 1853, Jl. Pal. 1853, 2, 376. But merely the seller's fears or a report of the buyer's insolvency will not justify a refusal to deliver. Cass. 26 Nov. 1861, Jl. du Pal. 1862, 332; Cass. 24 Nov. 1869, Jl. du Pal. 1870, 280; Cass. 8 Aug. 1872, Jl. du Pal. 1870, 157.

[3] Code Civil, Art. 1653. But if the difficulty affects only a small part of the property sold, the buyer cannot retain the whole price, but only a portion corresponding to the value of that part. Troplong, Vente, II. § 612. The threat or fear of eviction is not ground for dissolution of the sale but only for delay in paying the price. Cass. 2 Jan. 1839, Jl. du Pal. 1839, 1, 18.

[4] Larombière, III. 100.

from the date of the contract,[1] and each party is bound to return what he has received. Each may, however, retain what he has received until the other party concurrently makes return.[2] If return is impossible, damages are awarded instead; [3] but one who has put it out of his power to return what he has received cannot ask for dissolution, though it may be decreed at the suit of the other party.[4]

The wide influence of the Code Napoléon on the legislation of other countries has made the preceding discussion of the law of France applicable not to that country alone. In Belgium the Code Napoléon as such is in force, and the law of the country is regarded as French law.[5] In Holland the Code Napoléon is the foundation of the civil code in force, and Art. 1302 of the latter corresponds to Art. 1184 of the former.[6] In Italy the Codice Civile has the same basis. Art. 1165 of the latter corresponds to the French Art. 1184,[7] and Art. 1469 to the French Art. 1612.[8] In Baden and some of the German Rhine provinces the Code Napoléon is still in force.[9] In Spain the first part at least of the French Article 1184 authorizing dissolution of a contract for breach seems to have been early adopted [10] and the provision was carried across the ocean in that form to Mexico, Peru, and doubtless other Spanish-American colonies.[11] In Spain itself,

[1] Cass. 31 Dec. 1856, Jl. du Pal. 1857, 337; Cass. 5 Dec. 1881, Jl. du Pal. 1882, 248.

[2] Cass. 2 June, 1886, Jl. du Pal. 1890, 1, 930.

[3] Cass. 14 Dec. 1875, Jl. du Pal. 1877, 31.

[4] Bordeaux, 7 Mar. 1845, Jl. du Pal. 1846, 2, 67.

[5] Saleilles, Ann. de Droit Comm. VII. 27; Zachariä von Lingenthal und Crome, Handbuch des Französischen Civilrechts (8th ed.), I. 49, note 4.

[6] Zachariä von Lingenthal, I. 49, n. 4. A decision of the High Court of the Netherlands, 14 Dec. 1893, Jl. du Pal. 1894, 4, 29, shows a minor difference between the law of the Netherlands and France referred to, *ante*, p. 88, n. 3.

[7] The Italian article is a literal translation of the French, except that four words are inserted for greater clearness. See *ante*, p. 93, n. 1. Giorgi, Teoria delle Obbligazioni, IV. 212, n. 1.

[8] Giorgi, IV. 203.

[9] Aubry-Rau, I. 20. Entscheidungen des Reichsgerichts, I. 217.

[10] Schmidt, Law of Spain and Mexico, 2, 96. "If the contract be synallagmatic, or one by which the contracting parties have assumed reciprocal obligations, the failure of one to comply with his agreement entitles the other to demand the rescission of the contract."

[11] Schmidt, 98: Code Civil Méxicain, Résumé analytique, R. de la Grasserie (Paris, 1895), 114; Code Civil Péruvien. Résumé analytique, R. de la Grasserie (Paris, 1896), 166. The Mexican Code also expressly provides a right to recover damages in connection with the dissolution of the contract, and gives a right specific performance as an alternative.

however, Art. 1124 of the latest Civil Code,[1] contains in substance the whole of the French Art. 1184, and the French Art. 1612 is repeated in the Spanish Art. 1466. In Poland the Code Napoléon was introduced and is still in force for the most part.[2] In this country the Code of Louisiana, drawn chiefly from the same source, repeats, almost literally, the provisions of the French law on the matter in question.[3] And in Lower Canada the Civil Code allows at least a general right to treat a broken contract as dissolved.[4]

In Germany (except in the Rhine country where French law prevails), the law so far as it is not changed by statute, following the rule of the Roman law, denies to one party to a bilateral contract the right to withdraw from it or treat it as dissolved because of breach of the contract by the other party.[5] Breach of express or implied warranty of goods sold authorizes this remedy and it is also allowed where performance by the party in default has no longer any value for the other party. Further, where performance has become impossible by lapse of time or other reason, in effect, if not in name, the aggrieved party by refusing to perform until he receives performance secures the same result.[6] But many cases

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[1] Promulgated July 24, 1889.

[2] Lehr, Droit Civil Russe, Introduction; Zachariä von Lingenthal, I. 50; Foucher, Code Civil de Russie, Art. 890.

[3] Arts. 2046 and 2047 are equivalent to Art. 1184; and Art. 2487 is equivalent to Art. 1612 of the French Code. Arts. 1911 *et seq.* of the Louisiana Code provide for formal methods of putting a party in default, similar to those of the French law. Specific performance is not allowed in Louisiana when compensation can be made in damages. Code, Art. 1927; Mirandona *v.* Burg, 49 La. An. 656.

[4] Art. 1065 provides that the party aggrieved may have damages, or specific performance if that is possible "or that the contract from which the obligation arises be set aside." Art. 1066 allows him to "require also that anything which has been done in breach of the obligation shall be undone, if the nature of the case will permit."

[5] Although Windscheid regards the right to treat a contract as dissolved and recover back whatever has been given under it because of the failure of the other party to perform, as contrary to the fundamental principles of the bilateral contract, in that a promise or right of action is all that has been bargained for and that is still enforceable (Lehrbuch, II. § 321, 2, note 10), yet he maintains that the doctrines of the modern law in regard to mistake necessarily lead to the conclusion that not only one who performs under the mistaken idea that the other party has already performed, but also one who performs under the mistaken expectation that the other party is going to perform, is entitled to treat the contract as dissolved and recover what he has given. Lehrbuch, II. § 321, 2, note 10 a. But, as Windscheid himself admits, the prevailing view is otherwise. For this see Dernburg, II. § 21, note 6; Römer, in Zeitschrift für Handelsrecht, XIX. 123.

[6] See cases in note 2, p. 96.

are outside these limits.[1] The right to treat the contract as dissolved may be secured by special agreement (Lex commissoria),[2] and in some of the states of Germany, notably Prussia,[3] the rule of the common law has been changed.

Imperial legislation, also, whenever it has dealt with the subject, has enlarged the scope of the right in question. Thus the com-

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[1] In a decision of the Amtsgericht, Celle, 1 July, 1879, Seuffert's Archiv, XXXV. 19, the plaintiff agreed to sell and the defendant to buy real estate. A small instalment of the price was paid and the rest was deferred. Possession was to be given on payment of the second instalment of the price. This was not paid and possession was not given, and the defendant became wholly irresponsible financially. Two years or more later the plaintiff sued for the dissolution of the contract, alleging these facts, and that he was unable to sell his property while the contract was in force. The suit was dismissed. The remedy sought, it was said, is only permissible when, owing to the default, performance of the contract is no longer valuable. If a party wishes the right to dissolve a contract in any case of breach he must make a commissory pact.

Nearly as strong a case is a decision of the Oberlandesgericht, Cassel, 9 Apr. 1891, Seuff. Arch. XLVII. 147, where the seller, after making one offer of performance, which on suit was held insufficient, was allowed to enforce specifically a contract for the sale of land, though it was more than four years and a half after the contract before a proper offer was made by the plaintiff. See, however, *contra*, a decision of the Obergericht Wolfenbuttel, 2 Oct. 1877, Seuff. Arch. XXIII. 404.

In a decision of the Reichsgericht, 15 June, 1896, Seuff. Arch. LII. 144, it appeared that the plaintiff bought from the defendant the business of publishing the Munich Directory, part of the payment being deferred, The plaintiff made default in an instalment of the price, and the defendant at once started a rival publication. The plaintiff sued for the suppression of this and for damages. The defendant made counter claim for the unpaid price. The court held the plaintiff could not recover because he had not performed. The defendant could not treat the contract as dissolved, but as he had made performance impossible, he could only recover the value of what he had given and the burden was upon him to prove what this was and that it was more than he had received.

See also a decision of the Oberstgerichtshof für Bayern, 30 Apr. 1875, Seuff. Arch. XXXI. 158.

[2] See Bürgerliches Gesetzbuch, §§ 346–361. If one entitled by commissory pact to dissolve a contract, and also entitled to sue for its breach, manifests a definite election of one right (as by suit) he loses the other as in the Roman law (see *ante*, p. 92, n. 4). Reichsgericht, 21 May, 1897, Seuff. Arch. LII. 425. But it was held in this case that a dunning letter after default was not a definite election to abide by the contract.

In a decision of the Oberamtsgericht, Wiesbaden, 19 Dec. 1856, Seuff. Arch. XI. No. 232, it was held that in the case of perishable goods the agreement upon a fixed time within which the contract must be fulfilled indicates an intention to allow either party to withdraw from the contract for default of the other in performing within this time. A similar decision as to goods intended for consumption or resale and subject to frequent change of price is that of the O. A. G. München, 21 July, 1856, Seuff. Arch. XI. No. 141. The court, distinguishing the case from a contract in regard to land, say the non-performance is not simply *mora* but breach of contract.

[3] Förster–Eccius, Preussisches Privatrecht (4th ed.), II. 90 (note 75), 307, 318; Entsch. R. G. XXXVI. 222; Seuff. Arch. XXIV. No. 228; Ibid. XXI. No. 114.

mercial code, or Handelsgesetzbuch, makes important provisions in regard to contracts of sale coming under the head of commercial transactions.[1] If, in such contracts, the buyer is in default with the price and the goods have not been delivered, the seller has among other remedies that of acting as if the contract had never been entered into.[2] If the seller is in default the buyer has a similar right, and in this case it is not essential that the contract should not have been fulfilled by the party also who is not in default.[3] Whatever has been given under the contract must be returned.[4] If a party wishes to avail himself of this right he must give the other party notice of the fact after performance is due, and if the nature of the case allows it, grant a specified term for performance.[5] This is unnecessary where the contract itself provides that the goods shall be delivered at a time certain or within a fixed period; and in such a case prompt notice must be given if it is intended to compel the defaulting party to specific performance, rather than to the payment of damages or the dissolution of the contract.[6] If performance on both sides is divisible, a party can only withdraw from the unfulfilled portion of the contract.[7]

Besides being applicable to but a limited number of cases, the value of the remedy of withdrawing from the contract or treating it as dissolved is much decreased by the rule that one who adopts this remedy not merely frees himself from any obligation to perform, but discharges the other party from liability in damages for failure to perform.[8] The remedy is, therefore, of practical value

[1] Such contracts are substantially contracts for the purchase and sale of personal property in order to resell it, whether in the same form or not. Handelsgesetzbuch, Art. 271, 272; Hahn, Commentar zum Handelsgesetzbuch, II. 3–42, 76.

[2] H. G. B. Art. 354; Hahn, II. 352.

[3] H. G. B. Art. 355; Hahn, II. 359.

[4] Hahn. II. 358.

[5] H. G. B. Art. 356; Hahn, II. 363.

[6] H. G. B. Art. 357; Hahn, II. 375.

[7] H. G. B. Art. 359; Hahn, II. 390. But he may withdraw from performance of all the remaining instalments. Failure by either the buyer or seller to perform as to any instalment justifies the other party in refusing to deliver or receive any further instalments. Reichsoberhandelsgericht, 7 Mar. 1871, Entsch. II. 84; 14 Mar. 1874; Entsch. XIII. 78; 21 Mar. 1874, Entsch. XIII. 102; 5 Apr. 1875, Entsch. XVI. 190, 193, Oberlandesgericht, Braunschweig, 9 Jan. 1891, Seuff. XLVI. 339.

In a decision of the R. O. H. G. 25 Jan. 1873, Entsch. VIII. 423, it was even held that failure on the part of the seller to deliver the stipulated quantity, justified refusal to pay for what had been delivered until the remainder was delivered, though the price was not a lump sum.

[8] Hahn, II. 358; Entsch. des R. O. H. G. XVII. 422, 13 Feb. 1875; Entsch. des Reichsgerichts, XXXIX. 170, 11 May, 1897.

only when the party seeking it has made a bad bargain, and is consequently not damaged by the loss of it. Further a party who has received anything under a contract cannot treat it as dissolved unless he is able to return uninjured what he has received.[1]

After January 1, 1900, statutory rules will be of wider application. On that day a practically complete codification of German law will take effect. The present Handelsgesetzbuch will be superseded by a new one, and the Bürgerliches Gesetzbuch, which has been in process of formation for nearly twenty years, will become operative. Owing to the general provisions of the Bürgerliches Gesetzbuch, the new Handelsgesetzbuch does not contain the special provisions of the previous one. Commercial contracts are thus made, so far as the matter in question is concerned, subject to the same rules as other contracts. One special provision, however, is retained. If a commercial sale provides for delivery at a fixed time or within a fixed period, the buyer may withdraw from the contract if delivery is not made promptly; and if he desires specific performance instead of damages or dissolution of the contract, he must notify the other party promptly.[2]

The provisions of the Bürgerliches Gesetzbuch will generally enable a party to a contract to treat it as dissolved for non-performance by the other side.[3] Unless he himself has parted with something under the contract which he wishes to recover, his attitude if he avails himself of the remedy will be that of a defendant, not as in France that of a plaintiff. In some cases, however, no such right is given. Certainly where the plaintiff's default in performance whether total or partial may still be made good, time

[1] Thus temporary use of a machine debars the buyer from returning it after it has proved unsatisfactory. Case last cited.

[2] § 376. This corresponds to § 357 of the present H. G. B.

[3] § 325 provides that in case the entire performance due from one party becomes impossible because of circumstances for which he is responsible, the other may claim damages for the non-performance or withdraw from the contract. The same is true in case of partial impossibility where the part performance which is possible has no value by itself to the party receiving it. § 326 provides that in case a party to a contract is in default the other party may set a fixed time with the declaration that he will not accept performance after that date. If performance does not follow within the time specified, he may claim damages for non-performance (he cannot claim specific performance) or withdraw from the contract. The provision of § 325 in regard to part performance also applies here. Further, if the performance of the contract is of no value to the party to whom it is due in consequence of delay in offering it he has the rights given by § 326 without the necessity of fixing a period of grace. § 454 contains the limitation that if a seller has fulfilled the contract on his part and given credit for the price, he cannot thereafter withdraw from the contract.

neither being of the essence from the nature of the contract or because of notice given as provided by § 326, the defendant must protect himself in some other way. And even where the contract may be treated as dissolved, here as in the case of the provisions of the Handelsgesetzbuch, there is no right given the party aggrieved to make good a claim for damages. Nor can he, presumably, treat the contract as dissolved unless he can return what he has received.

In spite of the statutory provisions just considered, therefore, the negative right of refusing to perform unless or until the other party shall do so retains and is likely to retain its importance. It has been a well recognized right for a long time, and for more than a century there has been active discussion in regard to it under the name of the *exceptio non adimpleti contractus*.[1] The discussion[2] has for the most part turned rather on the theoretical nature of the defence than on its practical applications. The main point in dispute has been whether it is part of the plaintiff's case to allege and prove performance. It seems to have been generally conceded from the outset that the plaintiff in order to win his case must prove performance, and it has been general practice at least for the plaintiff's declaration or complaint to contain an allegation of performance.[3] The natural inference would be that the allegation of performance is essential to the plaintiff's case and that such performance is a condition precedent to any actionable right on his part. Such was the prevailing doctrine in the early part of this century.[4] It was a consequence of this doctrine that the so-called *exceptio* was not a proper *exceptio* but merely a denial of an allegation in the plaintiff's declaration. In 1824 an essay by Heerwart[5] supported by new reasoning a contrary view. His theory was that

[1] The use of this name for the defence, or of *exceptio non impleti contractus*, the earlier form, and that still used in Italy — dates from the end of the seventeenth century.

[2] A complete and to some extent annotated bibliography of the German literature relating to the subject till the year of publication (1890) may be found in André, Die Einrede des nicht erfüllten Vertrages, 3–13, 23–27. A less complete but good bibliography, especially of more modern writers, is contained in Windscheid, Lehrbuch des Pandektenrechts (7th ed. 1891), II. § 321, note 2.

By far the most complete and satisfactory discussion is contained in the book of André. The best short treatment is that of Heerwart, Archiv. f. d. Civil. Praxis. VII. 335 (1824). All the general handbooks of German law deal with the subject. The best of these, so far as the point in question is concerned, are Dernburg, Pandekten, II. §§ 20, 21, and Windscheid's Lehrbuch, cited above, II. § 321.

[3] André, 27, 45.

[4] André, 24, and authorities cited.

[5] Archiv f. d. Civ. Praxis, VII. 335.

the plaintiff, in proving that he had performed, was proving matter which, if the pleadings were fully carried out, would be alleged not in the declaration, but in the replication. He maintained that the plaintiff makes out his original case by proving the defendant's matured promise; the defendant in turn makes out his defence by proving the plaintiff's counter promise. This gives rise to a cross-claim equivalent to, and counterbalancing the plaintiff's right; as if to on action on a debt the defendant should plead in set-off an equal debt due him by the plaintiff. In order to meet the defence of a counter promise set up by the defendant, the plaintiff should by replication allege that he has fulfilled his own promise; just as in the case of set-off it would be the duty of the plaintiff to allege in a replication that he had paid the debt claimed by the defendant, not the defendant's duty to allege that the plaintiff had not paid the debt.[1] So it would be matter for replication if the plaintiff's promise was discharged in any other way than by being performed, as by release, waiver or prevention by the defendant or by impossibility of which the defendant bore the risk. *Exceptio non adimpleti contractus* is a misnomer for the defence, upon Heerwart's theory, as the words imply that the plaintiff's non-performance is part of the defendant's exception. *Exceptio prius adimplendi contractus* has been suggested as a more appropriate name.

This theory of the defence became the prevailing one, both with legal writers [2] and with the courts.[3] But whether the plaintiff must

[1] The burden is universally on the debtor to prove that he has performed. Dernburg, II. § 21, I. 1.

[2] André, 24, marshals the writers. But legal opinion is by no means unanimous. The method of argument ordinarily followed is to establish by historical or analytical reasoning the nature of a bilateral contract and then deduce the consequences. Two views have divided most of the writers: (1) Two independent obligations are created by a bilateral contract but each is to perform not in any event but in return for counter performance. Each obligation is, therefore, conditional on the performance of the other. (2) Two independent obligations are created, but on grounds of justice a defence is given to each party by means of which he can compel performance by the other party precedent to or concurrent with his own. For the first of these views Keller is regarded as the ablest champion. The second is supported by Windscheid, Dernburg and most recent writers. German ingenuity has not been exhausted by these two views. Though little support has been given other views, the further suggestion has been made; (3) that the promises create wholly independent obligations; (4) that there is but a single united obligation, namely. that both performances shall take place. See Windscheid § 321, note 2; André, 28. Bechmann (Der Kauf, I. 568) distinguishes the "genetic synallagma" or bilateral contract in its creation where mutuality is essential from the "functional synallagma" or bilateral contract in its performance where mutuality is not essential but merely equitable. Bechmann believes that neglect to observe this distinction has led Keller and those who take the same view into the position they occupy.

[3] André, 17. And see the case stated in the following note.

allege and prove performance as part of his original case or as a reply to a defence is a question of little practical importance. Its principal direct bearing is stated by André to be in case of judgment by default against the defendant, when the plaintiff in his declaration does not allege that he has performed his part of the contract.[1] As the ordinary practice of plaintiffs is to allege that they have performed,[2] whether it is or is not essential to do so, it is obvious that decision is not often required as to whether the allegation should be in the declaration or in a replication.

Most of the cases which present any real difficulty are those where the plaintiff has either offered to perform or actually performed wholly or partially, and the defence is not that there has been no performance at all but no sufficient or satisfactory performance. The name *Exceptio non rite adimpleti contractus* was invented for this defence about the middle of the eighteenth century. Its distinguishing feature was that the burden of proof was upon the defendant. Though the conception found favor for a while, it was soon criticised by the writers. It was pointed out that performance of something other than what the contract requires is no performance as far as that contract is concerned, and that the defendant may safely assert that the plaintiff has not performed. If, however, the writers added, the defendant, as often happens, seeks not merely to defeat the plaintiff's claim but to establish an independent right of his own, as the dissolution of the contract, or damages for the plaintiff's defective performance, the burden of making out the facts on which such a right is based rests upon him. This way of dealing with the subject found pretty general acceptance,[3] but a modification of it is strenuously contended for

[1] André, 27. It was of decisive importance also in a decision of the Reichsgericht, 10 Oct. 1890, Seuff. Arch. XLVI. 225. Certain procedure is allowed exclusively for cases where the plaintiff's claim is based wholly on documentary evidence. In this action, which was on a bilateral contract, the defendant claimed that as the plaintiff could not prove by documentary evidence that he had performed on his part, the form of procedure was inapplicable and that consequently the action must be dismissed. The court held the contrary, on the ground that proof of performance was not part of the plaintiff's original case. O. L. G. Celle, 6 Oct. 1886, Seuff. Arch. XLII. 109, is to the same effect.

[2] André, 45.

[3] According to this view since the same facts might be relied on either for the assertion of an independent claim or for a defence the defendant's pleading "must set out the object he is seeking by his defence, not merely the facts, leaving the court in the dark with what aim he does so, — whether he wishes to deduce the right to dissolve the contract or to a diminution of the price or to a retention of the price until completion of performance, or finally to indemnify by way of damages." From a decision of the Oberamtsgericht, Dresden, 5 May, 1859; Seuff. Arch. XIII. No. 184.

in the work of André to which frequent reference has been made. He admits that if a plaintiff has performed but half what he was bound to or has not performed at the place or time he should, the defendant need take no initiative at the trial, for the plaintiff must prove performance and the facts evidently indicate that he has not performed. But if the plaintiff agrees to sell a specified article and actually delivers it or builds a house or otherwise does apparently the thing he promised to do, André would have the proof shift and would throw upon the defendant the burden of showing that the apparent performance was not really performance, because the article sold lacked warranted qualities or the house was defectively built.[1] Dernburg supports this distinction[2] and many judicial decisions are in accord with it.[3]

The defence of the *exceptio non adimpleti contractus* is usually called a dilatory one,[4] and the defendant's situation compared to that of a pledgee, who holds the pledge simply to enforce payment by the debtor. The defendant says: "I will not perform as long as you do not," but as André points out this must frequently change into the formula "I will not perform because you have not." This will be so in every case where performance by the plaintiff is or has become impossible;[5] and also where the plaintiff claims that he has performed and does not intend to do anything more in any event. Sometimes it will be uncertain whether the plaintiff may, if he chooses, perform again, as where it is not clear whether time is an essential part of the

[1] A large part of André's book is devoted to establishing this thesis. The distinction suggested seems from the standpoint of the Common Law to amount to this: in one class of cases the plaintiff has made out a *prima facie* case, which will, in the absence of other evidence, sustain the burden imposed upon him of proving performance; in the other class of cases he has not. But the German writers, whether because their procedure does not separate law and fact carefully or for other reasons do not seem to discriminate here between the burden of bringing forward evidence to meet a *prima facie* case, and the burden of finally establishing the essential elements of a claim or defence.

[2] II. § 21 (3d, 4th, 5th eds., modifying views expressed in 1st and 2d editions).

[3] See citations given by André, 72, 120.

[4] André, 127; Dernburg, II. § 21.

[5] In Entsch. R. G. XXXVI. 228 (11 Oct. 1895) the court resorted to rather technical reasoning to make out performance was impossible and thereby to deprive a party of a right to perform again. Under a contract for the sale of rice flour he had furnished inferior goods. After some dispute and delay he offered different flour. The court held that a contract for the sale of unspecified goods became a contract for the sale of specified goods, as soon as goods were furnished under the contract, and that, therefore, if the goods so specified were not in accordance with the contract performance was impossible and the buyer need not accept other goods.

contract. It follows from the theory that the defence is dilatory that the judgment rendered when it is successfully set up is against the defendant subject to the condition of the plaintiff's performance.[1] But here again when the plaintiff has failed to perform irretrievably the judgment must in effect be absolute.

A party is said to be entitled to refuse to perform at all until his co-contractor has completely performed,[2] and, as before, theory has to receive essential modification in practice. If the performances are divisible or payments are to be made in instalments the right of retention is limited to an appropriate portion.[3] And in any case where the defendant has received the essential benefits of the contract he can only retain a part of his own performance by reason of a particular defect which does not seriously impair the benefit of what he has received, not, it is said, because the defence is not technically applicable, but because it would be fraudulent for the defendant to make use of it.[4] This is not the equivalent of restricting the defendant to a counter claim for damages, though obviously

[1] André, 129; Dernburg, II. § 21. So provided in the Bürgerliches Gesetzbuch, § 322. Conf. Hasenöhrl, Oesterreichisches Obligationenrecht, II. 411.

[2] André, 135; O. A. G. Lübeck, 18 June, 1840, Seuff. Arch. IX. No. 216; O. A. G. Darmstadt, 27 Nov. 1866, Seuff. Arch. XXI. No. 222. So in a decision of the Reichsoberhandelsgericht, 17 Jan. 1874, Entsch. XII. 229; Seuff. Arch. XXXI. 219. The plaintiff sold a clothing business to the defendant and contracted not to go into competing business. The action was for an instalment of the contract price of which but a small part had been paid. The defence was that plaintiff had joined a competing firm. The court rejected the plaintiff's suit, saying the agreement not to compete was not collateral but essential to give value to the goods. The defendant could not be compelled to accept damages, as he would be obliged to if the deficiency of the plaintiff's performance could no longer be cured.

[3] André, 136; O. A. G. Darmstadt, 27 Nov. 1866, Seuff. Arch. XXI. No. 222; O. L. G. Braunschweig, 1 May, 1889, Seuff. Arch. XLVI. 358. But see as to right of withdrawing from future performances of an instalment contract, *ante*, p. 97, n. 7.

[4] André, 137. Here again the question of burden of proof comes up. Must the defendant prove how much he may retain or must the plaintiff prove the limitations of the defendant's right? André favors the latter view, p. 137. In an action in the Obertribunal, Berlin, 9 Oct. 1877, Seuff. Arch. XXXIV. 281, the plaintiff sued for rent of a mill leased by him to the defendant for a term of years. The defence was that the mill was in such bad repair that the defendant had been able to do but a part of the work he might have fairly expected to do, and that a meadow forming part of the premises contracted for had not been delivered to him but had been leased to another. The court held that the defendant could not be restricted to a counter claim for damages, and that though plaintiff might fairly be entitled to some rental, yet as the fault was the plaintiff's the defendant could not be compelled to prove how much the plaintiff's breach of contract had lessened the contract price; rather it was the plaintiff's duty to show what amount he was entitled to demand in view of all the circumstances, and if he did not do this his suit must be dismissed. See also R. G. 15 June, 1896, Seuff. Arch. LII. 144, stated, *ante*, p. 96, n. 1.

approaching it. The theory of the defence here, as generally, is based on the supposition that performance is still possible and the defendant's retention is not to be permanent but merely until the plaintiff's performance is completed.[1] The defendant is, however, restricted to a counter claim for damages, when the unfulfilled promise of the plaintiff is collateral to the main object of the contract.[2]

In addition to these limitations of the defendant's right another very comprehensive one has been suggested and sometimes laid down by the courts. It is argued that as the defence is dilatory and has for its object forcing the plaintiff to perform, it is not appropriate where the plaintiff's performance has become impossible, whether with or without his fault. This reasoning is equally applicable whether the plaintiff has partly performed or has done nothing; but the cases where it has been applied have been cases of part performance.[3] André opposes the theory. As he says, if a

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[1] This theory is brought out in a decision of the Reichsgericht, 11 June, 1881, Entsch. R. G. IV. 197, also Seuff. Arch. XXXVII. 25. The plaintiff sued for the balance unpaid on a building contract. The defendant claimed to retain it because of defects in the work. The contract price was 1606 marks; 675 marks had been paid; the defendant claimed that it would cost about 650 marks to do the work properly. It was held that the defendant was entitled to retain the balance of 931 marks, the difference between this amount and that necessary to complete the contract not being so great as to make it "dolosus" for the defendant to exercise the right of retention.

The Bürgerliches Gesetzbuch provides that "if performance has been partially rendered by one side counter performance cannot be refused, in so far as the refusal would offend against good faith under the circumstances — especially because of the comparative insignificance of the portion in arrears." B. G. § 320.

See also a decision of the Oberamtsgericht, Wiesbaden, 4 May, 1842, Seuff. Arch. I. No. 39.

[2] For instance, breach of promise to repair leased premises will not ordinarily afford ground for non-payment of rent, or for any other right than a counter claim for damages, O. A. G. Darmstadt, 27 Nov. 1866, Seuff. Arch. XXI. No. 222.

[3] R. O. H. G. 31 May, 1879; Seuff. Arch. XXXVI. 41. The plaintiff had undertaken to have an advertisement of a lottery inserted in 58 specified Italian newspapers. In some the advertisement was to appear six times, in others four times, in others twice. The defendant agreed to pay 6¼ francs for each insertion, though the advertising rates of the papers differed. The plaintiff's declaration alleged that the advertisement had appeared in but forty papers and of these five refused to repeat it, the refusals to insert or repeat the advertisement being due to the fact that dealing in foreign lottery tickets was contrary to the law of Italy. The plaintiff was allowed to recover on condition of proving the deficiency in performance was not due to her fault, especially as the attainment of the object of the contract did not require insertion in each paper. O. L. G. Darmstadt, 4 Feb. 1880; Seuff. Arch. XXXVIII. 25. The plaintiff had sold the defendant her entire establishment with its contents, including wine and supplies for an agreed price of 171,428 marks, payable in instalments. This action was for an instalment of 91,428 marks. The defence was that the quantity of wine and supplies was much less

man contracts for the use of a carriage on the first Sunday in August and does not get it, yet is sued for the hire, it is immaterial to him whether the plaintiff would not or could not furnish the carriage.[1] The late decisions of the Reichsgericht, too, have refused to limit in this way the application of the defence even in cases where the plaintiff had performed a large part of what he had agreed.[2] The Bügerliches Gesetzbuch, however, seems technically to have adopted the limitation. For though the general provision for the defence of unfulfilled contract is broad enough to include cases where the plaintiff's performance is not possible,[3] the later elaborate provisions for cases of impossibility are presumably

than the inventory had shown. The plaintiff was allowed to recover subject to the defendant's right to recoup damages for the plaintiff's breach of agreement, the court saying "It is a recognized doctrine of the courts that a contracting party who is sued may set up as a defence the plaintiff's partial failure to perform, and is not restricted to a counter claim for damages, but this is always provided that the remaining performance is still possible. The defence is essentially dilatory and can never take a peremptory character."

In a decision of the O. L. G. Hamburg, 21 Feb. 1885; Seuff. Arch. XL. 288, similar language is used and the plaintiff allowed to recover on a building contract, subject to the defendant's recoupment of damages for incomplete work, since the defendant had had the work completed, making completion by the plaintiff impossible.

The same doctrine is applied by the Oberst L. G. f. Bayern, 21 Oct. 1867, Seuff. Arch. XLIII. 153, in an action for a balance of the price of an estate, which proved, contrary to the agreement, subject to an incumbrance.

[1] André, 163.

[2] R. G. 21 Jan. 1887, Seuff. Arch. XLII. 282. The plaintiff and the defendant entered into a contract by which the former sold and the latter bought 200 hundredweight of wire nails at an agreed price. The plaintiff further agreed not to have a representative travel for trade through the surrounding towns. This action was for the price and the defence was that the plaintiff had allowed an agent to travel through the surrounding towns and had sold nails there. The court refused to allow recovery, holding the stipulation an essential part of the contract, and that the defendant's rights were not restricted to a counter claim for damages. "Though the defence of unfulfilled contract is in its nature dilatory only, yet its effect is peremptory if the seller has by his own wrongful act made it impossible to fulfil the contract. . . . Even if the plaintiff had sent an agent through the forbidden territory only after the defendant was in default in taking the goods contracted for, still the suit should be dismissed, because if the plaintiff wished to require fulfilment she must on her part be ready to fulfil."

R. G. 28 May, 1888, stated by Schall, in Arch. f. Civ. Praxis LXXIII. 429. The plaintiff sued for royalties promised annually for twelve years by the defendant in a contract by which the plaintiff on his part agreed (1) to teach the defendant a secret process (2) to give him an exclusive license under a patent. The plaintiff taught the process, gave the license and received the royalties for some years, but before the expiration of twelve years the patent was declared void and as the defendant refused to pay further royalties, this action was brought. It was held that the plaintiff, though not liable in damages, and though the royalties were payment for something besides the license, could recover nothing, as there was no way to apportion the payments.

[3] § 320.

exclusive.[1] Injustice to the defendant has been avoided as far as possible by enlarging and defining the right of the defendant to treat the contract as dissolved in this class of cases.[2] He is allowed to do so in any case where the plaintiff has not performed at all or where his performance is of no value to the defendant.[3]

The defence of unfulfilled contract is applicable to all bilateral contracts.[4]

A proper offer of performance, though not accepted, excludes the defence of unfulfilled contract.[5] It is customary to distinguish between "verbal" and "real" offers, and it is said that a bare oral offer is insufficient. There are no fixed rules, however, as to what is necessary beyond that. The formality required by the French law for putting in default does not obtain, but the party offering to perform must be so prepared for performance that the other party has but to receive it, and this must be made manifest.[6] It is immaterial whether refusal of the offer is due to wilful default or to impossibility from subjective causes. One who because of illness

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[1] §§ 323, 325.

[2] Where there has been no performance the difference between this affirmative right if allowed and the right of the *exceptio non adimpleti contractus*, is that the defendant must prove non-performance in the first case, while the burden is upon the plaintiff in the second. Where there has been part performance a dissolution of the contract involves a return of whatever has been given by either party. In the case of the *exceptio non adimpleti contractus* such a return must be obtained, if at all, by independent proceedings. Besides these differences, the measure of damages in such a case as the first cited in note 3, p. 104, would be different. If the contract were dissolved any recovery would be based on unjust enrichment, not on the contract price.

[3] B. G. §§ 323, 325. See *ante*, p. 98, n. 3.

[4] Dernburg, II. § 21. It is not necessary that the stipulated performances are intended as an equivalent exchange. In Entsch. R. O. H. G. VIII. 423, 25 Jan. 1873, the buyer was allowed to retain the price of goods delivered because of the seller's failure to deliver all the goods, though the price was not a lump sum. But in a decision of the O. L. G. Hamburg, 2 Oct. 1891, Seuff. Arch. XLVII. 257, the principle was limited. The plaintiff had sold his business to the defendant, the latter agreeing among other things to pay annually for some years 2% of the amount of gross business, and to make statements of the business. The plaintiff sued for one of the promised statements. The defendant set up in defence that certain money was due him on the transaction. It was held that though this would have been a defence if the plaintiff had been suing for the 2%, it was not a defence to the merely "preparatory suit" for the statement.

[5] Because it would be fraudulent to make use of the defence under such circumstances. The offer is technically matter for replication.

[6] The Bürgerliches Gesetzbuch lays down some general rules which will become operative in 1900. §§ 284, 293–299. A verbal offer is made sufficient if the other party declares that he will not accept, or if his coöperation is necessary to make the performance effectual, as by calling for and taking goods.

cannot use a room engaged in an inn, one who is prevented from taking a music lesson because of a lame hand, must none the less pay the stipulated price, less any saving made by the other party from being freed from performing.[1]

Preventing performance by the other party has the same effect as refusing to accept proffered performance. Indeed, the boundaries between an unconditional refusal to accept performance, that is, to co-operate in carrying out the contract, and a prevention of performance, are not always definite.[2]

As in the French law, mere receipt of performance does not necessarily imply such an approval of it as will prevent subsequent objection. Defects not apparent on ordinary examination, at least, are not thereby excused.[3] Approval of performance also may indicate not an intention to treat the performance as full compliance with the contract, but merely to accept the performance as a partial or incomplete fulfilment of the contract, with a reservation of the right to demand damages or diminution of the price because of any defects. In the latter case, any right to dissolve the contract, and also the right to set up the *exceptio non adimpleti contractus*, are lost, but not the right to an action or counter claim for damages. In case of doubt André holds that as it is a question of the surrender of rights, the latter interpretation should be put upon the facts.[4]

Where a party to a bilateral contract agrees to perform before the other, there seems to be recognized no general rule that the prospective inability or expressed intent not to perform by the other party excuses performance of the precedent obligation. The Bürgerliches Gesetzbuch provides[5] that the party bound to precedent performance may, if an essential impairment in the circumstances of the other party occurs after the conclusion of the contract, refuse performance unless the counter performance, or se-

[1] André, 141, 144; Bürgerliches Gesetzbuch, § 325. [2] André, 142.

[3] André, 175. Even defects which would be apparent on examination, it is said, are not excused, if not in fact discovered. Windscheid, II. 446, § 394. But the Handelsgesetzbuch (Art. 347) requires in the case of goods sent from another place, that the buyer shall make prompt examination and give immediate notice of any defects, and in case of failure to do so shall be regarded as having approved the goods, so far as concerns defects which would have been discovered by ordinary examination. Latent defects must be notified to the seller as soon as discovered, or will be regarded as waived. § 377 of the new Handelsgesetzbuch repeats these provisions, and extends them to sales in the same place.

[4] André, 173. See a decision of the Reichsgericht, 12 June, 1885; Seuff. Arch. XLI. 15.

[5] Section 321.

curity for it, is given concurrently. This, however, does not apply when the irresponsible party was irresponsible when the contract was made. And the case of one whose prospective failure to perform is due to other causes than failing circumstances is not covered.[1]

In addition to the right to enforce specific performance, the right to treat a contract as dissolved, the right to damages either in a direct action or counter claim, and the *exceptio non adimpleti contractus*, there is still another remedy in Germany, of occasional application, for breach of contract. This is "Preisminderung," an appropriate diminution of the price or performance to which the party in default would otherwise be entitled by the terms of the contract.[2] In many cases this remedy is equivalent in its results to the ordinary right of the defendant to have any damage to which he is entitled because of the plaintiff's imperfect performance deducted from the contract price. But this is not always so. It may be that the imperfection of the plaintiff's performance was due to an accident for which neither he nor the defendant is responsible, and for which, consequently, the plaintiff is not liable in

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[1] The question does not seem to have been discussed. The following decisions show perhaps a tendency to allow prospective inability as a defence.

R. G. 27 Apr. 1892, Seuff. Arch. XLVIII. 441. Plaintiff agreed to buy, defendant to sell, rice flour, to arrive by vessel at Hamburg, payment to be "cash on delivery of the bills of lading." The bills of lading when offered to the plaintiff had written on them, "bag sewings insufficient." The plaintiff refused to accept the bills and sued for damages. It was held that he was entitled to sue. Though he was bound to pay cash before delivery of the goods, and could not claim to hold the price till they were proved good, but must pay, and if they were bad sue to recover what he had paid, yet the bills of lading must at least give him the expectation that the goods were conformable to contract. R. G. 22 Apr. 1893, Seuff. Arch. XLIX. 191. In case of a similar contract, the goods had arrived at the time the bills of lading were offered. It was held that the buyer was entitled to examine the goods before making payment, and reject them if of defective quality.

A party who has acquired a right of action on a contract may lose his right by his own subsequent breach of contract.

In R. G. 15 June, 1896, Seuff. Arch. LII. 144 (stated *ante*, p. 96, n. 1.), impossibility of performance by the defendant was held to excuse performance by the plaintiff, though at the time when the plaintiff's performance was due, the defendant's performance was continuing and had not become impossible. See also R. G. 21 Jan. 1887, Seuff. Arch. XLII. 282 (stated *ante*, p. 105, n. 2).

[2] This is derived from the *actio aestimatoria* or *quanti minoris* of the Roman law. In contracts of sale, at least, it was an alternative remedy to the *actio empti* and the *actio redhibitoria*. Hunter, Roman Law, 505; Salkowski, Roman Law, 602; Moyle, Sale in Civil Law, 194, 210–212. The remedy exists in France, Code Civ. Art. 1644, Aubry-Rau, IV. 389, 392, and presumably in other countries whose law is derived from Roman sources, see *e. g.* McVeigh *v.* Lussier, 13 Lower Canada Rep. 265, but seems of wider and more frequent application in Germany than elsewhere. It does not exist in Austria, see *post*, p. 109, n. 5.

damages; yet the defendant ought not to be compelled to pay the full price.[1] A second case is where the imperfection of the plaintiff's performance, though wrongful, has not caused the defendant any damage.[2] Further, loss of profits which the defendant would have gained, though an element of damage, is not considered in this remedy.[3]

In Austria the same general principles prevail, for the most part, as in Germany. The right of treating a contract as dissolved because of default of performance of the other party is confined to cases covered by the Handelsgesetzbuch and a few special cases,[4] and the rights of an injured party are therefore generally limited to specific performance, damages, or the *exceptio non adimpleti contractus*.[5] The rules in regard to these are drawn from German authorities.

Samuel Williston.

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[1] Bürg. Gesetzbuch, §§ 323 *et seq.*

[2] An interesting illustration of this is found in a decision of the Reichsoberhandelsgericht, 6 June, 1877, Seuff. Arch. XXXIV. 426. The defendant hired a steamer of the plaintiff for the purpose of carrying passengers to see the manœuvres of the German navy on a certain day. The plaintiff warranted that two hundred passengers could sit on the deck, allowing ten square feet for each. The defendant agreed to pay eight hundred marks. The action was for this price, the defence that there was deck room for but one hundred and twenty-five passengers, and that the defendant was therefore liable for but $\frac{125}{200}$ of the price. The plaintiff's reply to this was that the deficiency had caused the defendant no damage (apparently because he had been unable to sell even one hundred and twenty-five tickets to the boat), and the defendant admitted this. The Imperial Court held that the defendant was liable for but five hundred marks. If he had chosen, he could have refused the steamer altogether and relied on the *exceptio non adimpleti contractus*; but he might take the steamer, and as the plaintiff had warranted a particular quality which had a direct relation to the price fixed, the latter was not entitled to that price unless the quality existed. The defendant is no more guilty of bad faith in seeking to have the price reduced when the deficiency caused him no damage than the plaintiff would be in demanding the contract price if the defendant had been unable to use the steamer.

Another illustration is found in a decision of the Oberamtsgericht, Kiel, 29 Dec. 1860; Seuff. Arch. XIV. No. 129. The plaintiff sued for the price of twenty chests of tea sold to the defendant, and which the defendant had resold at a profit immediately. The defendant set up that the plaintiff had taken out of the chests some tea and that there was less remaining than had been agreed. The plaintiff urged that while this might justify the defendant in refusing to pay until he had received additional tea, or in rescinding the bargain, it could not justify a judgment for a diminished price, the bargain having been profitable to him. But the court in giving such a judgment, observed that the defendant was not seeking damages.

[3] R. G. 2 Apr. 1898, Entsch. R. G. XLI. 163.

[4] Hasenöhrl, Oesterreichisches Obligationenrecht, II. 338. But by the Austrian law, unlike the Roman law and German law, damages are at least in some cases allowed as an additional remedy to the dissolution of the contract. *Ibid.* II. 474.

[5] Hasenöhrl, II. 400–416, § 89. The Austrian law does not recognize the remedy of diminution of the price (*actio quanti minoris*). *Ibid.* II. 477, note 89.